

IN THE
SUPREME COURT OF THE
UNITED STATES.

OCTOBER TERM 1898.

N^o. 461.

JENNIE JOHNSON, ET AL. - - - *Appellants.*

V'S.

THE CREEK NATION, - - - *Appellee.*

*Appeal from the United States Court for the Northern
District of the Indian Territory.*

BRIEF FOR APPELLANTS

This is an appeal by Jennie Johnson and her children, Clarence Johnson Mary F. Johnson, Jennie B. Johnson, and Walter A. Johnson; James M. Barber and his children, Sarah E. Barber, Birdie E. Barber, John S. Barber, Pearl I. Barber, Niles Barber and Mary M. Barber.

Benjamin A. Barber and his children, Mariah E. Barber, Eva A. Barber, Ida B. Barber, Edward H. Barber, Sarah E. Barber and Dora D. Barber;
Martha S. Coker and her children, Silas G. Coker, James M. Coker, Robert T. Coker, Eva Coker, Maud F. Coker and Alva L. Coker;

Benjamin B. Posey;

Mary Lula Posey;

Nina G. Posey and her child, Fred Posey;

George W. Posey and his children, Katy Posey, Annie Posey and Claud Posey;

William Posey;

Mollie F. Stocton and her children, Roy M. Stocton, Harry T. Stocton and Grover C. Stocton;

R. F. Barber;

R. W. Barber;

H. J. Barber and his child, Jessie L. Barber and L. E. Barber.

from the Judgement and decree of the United States Court for the Northern District of the Indian Territory at Muskogee.

Under the provisions of the Act of Congress approved June 10th 1896, authorizing the Commission of the United States to the five Civilized tribes, to hear and determine applications for citizenship therein, these appellants applied in due time to said Commission to be enrolled as citizens of the Creek Nation, their application

being denied they duly, according to law, appealed to the United States court for the Northern District of the Indian Territory, and on the 16th, day of June 1898, that court by its decree refusing them admission to enrollment as citizenship of the Creek Nation, they appealed to this court.

These appellants allege that they are all Creek Indians by blood and residents of the Creek Nation, and that is the basis of their claim to citizenship.

The Act of Congress of June 10th, 1896 authorizing the commission to the five Civalized tribes to make a roll of the citizens of each tribe, provides as follows: "That said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said Nations and after such hearing they shall determine the right of such applicant to be admitted and enrolled." The purpose of this enrollment was, of course, but preliminary to the allotment of the lands of these Indian tribes in severaltia mong the individual members of said tribes. This will not be denied in the light of the current history of the time and the well defined and pronounced policy of the Government in reference to the Government and lands of these Nations, then and now being urged.

Under the treaty made by the Government with the Creek people on the 14th. day of February 1833, and

in accordance with the terms of that treaty, the United States, by the President Millard Fillmore, on the 11th, day of August 1852, by patent, conveyed the lands in the Creek Nation to the Creek tribe of INDIANS, that is to the tribe of INDIANS of the CREEK BLOOD.

The third article of the treaty of the 14th, day of February 1833, which is quoted in the Patent of the Government and with the Fourth Article is the authority for the Patent, is as follows: "The United States will grant a patent in fee simple to the Creek Nation for the land assigned said Nation by this Treaty or Convention whenever the same shall have been ratified by the President and senate of the United States, and the right thus granted by the United States, shall be continued to said tribe of INDIANS so long as they shall exist as a Nation and continue to occupy the country hereby assigned them".

Article 4th.: "It is hereby mutually understood and agreed between the parties to this treaty that the land assigned to the Muskogee Indians by the 2nd. Article thereof, shall be taken and considered as the property of the whole Muskogee or Creek Nation, as well as those now residing upon the land as of the great body of said Nation who still remain on the east side of the Mississippi.

"Now, Know Ye, that the United States of America, in consideration of the premises, and in conformity with above recited provisions of the treaty

aforesaid have given and granted, and by these presents do give and grant unto the said Muskogee or Creek tribe of *Indians* the tract of country above described. To have and to hold the same unto the said tribe of *Indians* so long as they shall exist as a Nation and continue to occupy the country hereby assigned to them.

By this grant, each Indian of the Creek blood had vested in him an interest in this land, to be continued to said tribe of INDIANS that is to be continued to the INDIANS of that tribe as long as they shall exist as a Nation and continue to occupy this country.

Congress under its power of control over these Indians, having entered upon the policy of changing this vested ownership in common to an ownership in severalty among all the Indians of the tribe, found it necessary to make an enumeration or enrollment of those entitled, under this patent, to take in severalty under the proposed new order of things, that is an enrollment of the Creek Indians by blood, who under the grant held the vested interest in the land.

The enrollment then which the act of Congress requires to be made of Creek Indians by blood, who could lawfully take in severalty a share of this estate. This is a case where blood must tell because the conveyance is to the people of the blood, so the prime and controlling enquiry in making this enrollment is and must be as to the blood of the party applying to be en-

rolled. This, the learned Judge, who tried this case, we respectfully submit, overlooked.

The citizenship which Congress provided might be applied for to the Commission was then more in the nature of membership by blood or status of blood of the Creek tribe than technical citizenship, and that should have been the paramount enquiry by Commission and Court.

That enquiry can have but one answer in fact and by the testimony taken in this case. Appellants are all Creek Indians by blood, as is universally admitted in their country and virtually conceded by the trial Court by resorting to what is known as the Alien Act of the Creek Nation, an act by which they attempted to disinherit, by law, certain Creek Indians who left the country and remained away for over twenty-one years, and by arguing that though they had been on the roll of Creek citizens they had been stricken from that roll by the notorious committee of eighteen whose conduct as shown by the testimony in this case was so fraudulent as to be unworthy of any Judicial consideration, and of whose conduct Mr. N. A. Gibson, Special Master in Chancery in this cause, says: "That the proof taken by me in regard to the action and proceedings of this committee of eighteen, discloses a condition of affairs that is startling on account of the corruption and folly indicated by the actions of the various members of the

committee. It appears that the sessions of the committee were held informally and that any visitor was at liberty to come in and if he heard a name called that did not please him he was at liberty to get up and say that he objected to that man and the name was forthwith stricken off." I printed Record page No. 25.

But the great question now to be considered in reference to these appellants is the question of Creek blood or no Creek blood. Mr. R. P. DeGraffenried, Special Master in Chancery, to whom this case was referred for inquiry as to the blood and Creek rights of these appellants has found and reported that they are all Creek Indians by blood. Printed Record Pages No. 9 to 17.

Again Mr. N. A. Gibson, another special master in chancery, to whom this case was referred for inquiry as to blood and citizenship of the parties, finds and reports that they are all Creek Indians by blood, and residents of the Creek Nation. Printed Record Pages No. 22 to 27.

Appellants are the grand children and great grand children of Benjamin Posey and his wife, Eliza Posey, nee Berryhill, both shown to be Creek Indians of the half blood and nephew and niece of John Berryhill, (Benjamin Posey and his wife being cousins.)

The testimony of Nathaniel Berryhill, Creek Indian by blood, found on page 43 of the printed record,

is referred to as showing the blood of Benjamin Posey, the ancestor of these families. He says, "was well acquainted with Benjamin Posey for fifty years in the State of Georgia, Alabama and Texas; that he left Alabama in 1846; that Benjamin Posey was a son of Nancy Posey, who was a daughter of John Berryhill, who was half blood Creek or Muskogee Indian. That the following named persons were the uncles and aunts of the said Benjamin Posey :

John D. Berryhill, Alexander Berryhill, Katie Self, nee Berryhill, Susan Self, nee Berryhill and Betsy Berryhill, all of whom were emigrants from Georgia to the Creek Nation about the year 1832. That the aforementioned persons are the sons and daughters of John Berryhill, who was a Creek Indian by blood and descent. That Eliza Posey, wife of Benjamin Posey, was a half blood Creek Indian."

The testimony of Silas H. Barber, John M. Posey, M. A. Posey, Mrs. E. H. Allen, John C. Barber, Robert T. Barber, Lucinda A. Smith, Shelton Smith, Mary E. Vance, Hugh R. Johnson, Joseph Mingo, G. A. Posey, R. S. Barber, Benjamin Posey, and L. C. Perryman, Principal Chief, found on the printed record from pages 44 to 64, bears directly upon the point of the blood of these appellants, and verifies the findings of Special Masters, DeGraffenreid and Gibson, and shows beyond the possibility of doubt that they are all Creek Indians

by blood and residents of the Creek Nation and sustain the first, second, third and fourth assignments of error made by appellants, and in fairness and law settles the case in their favor and ought to have ended the inquiry.

The testimony of George Tiger, Napoleon B. Childers, Joseph Mingo, Ellis Childers, Louis McGilbra, Moses Smith, James M. Barber, Upter Bird, Warrior Rentie, Gabriel Jamison, Louis McHenery, Tackie Grayson, N. O. Perry, Mrs. Eliza Allen found on printed record pages 65 to 82, corroborates and confirms the statement of the witnesses first named as to the blood of these appellants.

On page 82 of the printed record is found a copy of the decision and judgment of N. B. Childers, Judge of the Coweta District, Muskogee Nation in these words: "After questioning the witnesses in Barber's and Posey's case, I, N. B. Childers, Judge of Coweta District, rule and so decide that the claimants heretofore mentioned were citizens of the Muskogee or Creek Nation and entitled to enrollment. Witness my hand this the 13th day of June, 1893."

(Signed)

"N. B. CHILDERS,

Judge of Coweta District."

Attention is also called to the appointment by Upter Bird, Prosecuting Attorney of Coweta District, of James M. Barber, one of these appellants as, assistant Prose-

cuting Attorney, which office can only be held by an Indian by blood.

These parties have all the same ancestors, belong to the same family, and are of the same status as to blood and citizenship.

Mrs. Jennie Johnson, Benjamin A. Barber, James M. Barber, Mrs. Martha S. Coker, Mrs. Nina Posey, George W. Posey, Mrs. Mollie F. Stockton and H. J. Barber are the heads of families, the other appellants being their children and near relatives, all of whom stand in the same relation as to Creek blood, so that what is said in the testimony as to one of them applies to all.

Silas H. Barber, in his testimony, record page 47, says: "That on December 6, 1846, he married Sarah A. Posey, who is a daughter of Benjamin and Eliza Posey, who were recognized Indians by blood and descent, that Eliza Posey's name before marriage was Eliza Berryhill."

The following named persons are the sons and daughters of the said Silas H. Barber and Sarah A. Barber, nee Posey :

Robert T. Barber, born December 26, 1848, Benjamin A. Barber, born August 25, 1845 ; James M. Barber, born January 17, 1852 ; John C. Barber, born March 20, 1853 ; Martha S. Barber, born December 21, 1857 ; Mary A. Barber, born January 21, 1867.

He further states: "That the foregoing named sons and daughters of his are Creek Indians by blood and descent, that Benjamin Posey and Eliza Posey were the grandfather and grandmother of his said children and were recognized Creek Indians by blood and descent."

John M. Posey states: "That he is an acknowledged citizen of the Creek Nation and James M. Barber is a son of his fathers sister, making him a first cousin of the deponent, and that his father is an acknowledged citizen of the Creek Nation, and that the said Barber is a citizen of the Creek Nation and should be so acknowledged". Record 47.

M. A. Posey testifying as to the blood of B. A. and J. M. Barber and M. S. Coker, says: "That he is a member of the Creek Nation Indian Territory, that he is a first cousin to John C., Robert T., B. A. and J. M. Barber. and M. S. Coker by blood, that his father Bill Posey was a full brother by blood to their own mother Sarah Ann Barber, he further swears, "that all of said Barbers above named are one fourth Creek Indians." Record 49.

Mrs. E. H. Allen, a member of the Creek Nation, Indian Territory, says: "She is a member of the Creek Nation, that she is a sister of Sarah Ann Barber, the mother of John C. Barber, Robert T., B. A. and J. M. Barber, and M. S. Coker." Affiant further swears:

"That their mother and her own sister by blood was a one-half Creek Indian by blood." Record 49.

John C. Barber and Robert T. Barber, both depose and say : "That they are members of the Creek Nation of Indians; that they are part Indian by blood and are now recognized citizens of the said Nation and are enjoying all the rights and privileges appertaining to such Indians; they each further swear that they are full brothers of J. M. Barber, B. A. Barber and M. S. Barber, who is now the wife of M. L. Coker, having the same father and mother, they each and all five have one-fourth Indian blood in them, they further swear, that J. M. Barber has now living six children, to-wit : Bettie, Bertie, John, Pearl, Niles and Pink; that B. A. Barber has now living seven children, to-wit : Harrison, Mira E., Eva A., Ida B., Edward H., Sarah A. and Dorah D.; that M. S. Coker, their sister, had now living six children, to-wit : Silas, Marquis, Robert, Eva, Maud and Lena; they each further swear that M. S. Coker, their sister, did prove up her rights of such Indian blood and did draw her pay in the year 1891 in the Oklahoma money, amounting to \$29.00."

James M. Barber, being first duly sworn, says : "My name is J. M. Barber ; my age is forty-five ; I live in the Creek Nation, two and one-half miles from Wagoner ; my grandfathers name was Benjamin Posey ; my grandmothers name was Eliza Berryhill ; they were

both half breed Creek Indians. When I knew them first they lived in Texas, but they moved to this country years ago, about 1882. My mothers name was Sarah E. Posey. My father was a white man, his name was Silas H. Barber ; Tom Barber and John Barber are my full brothers ; I am between the two; I am a full brother of the two. They are the John C. Barber and the Robert T. Barber, whose names appear on page 178 of Perryman's Digest of the Creek Laws, approved October 30, 1889, also on Page 103 of McKillops Digest of 1893. * * * * I was born in Texas ; my grandparents are dead; my grandfather died in the Creek Nation and is buried on Billie Brown's place in the Creek Nation about eight miles from Choska. The other appellants in the Jennie Johnson case are all children, grandchildren and great grandchildren of Benjamin Posey. Bill Posey was my full uncle. He was killed in the Creek Nation by the authority of the Creek Nation. He was known and recognized by every one in this country as a Creek citizen and was never disputed. I came to the Creek Nation, Indian Territory, in 1872 ; I afterward left the Indian Territory and went back to Texas. I intended to come back. I have always, all my life claimed this as my home. My people have always claimed this as our home, and some of us have come back here every year. They came back and were recognized as citizens of the

Nation. I last came back here in September, 1890, and have resided here continuously ever since, and have all my possessions here.

I have made right smart improvements in the Creek Nation, I have farms, pastures, cattle and hogs; I was called before Judge Childers of Coweta District, Creek Nation, by a notice which is hereby presented and a copy filed herewith marked exhibit "B." The "light horseman" who served this on me told me that they wanted me to appear before the court and show why I was living here, that there was some dispute about it; that they wanted me to bring up all my connections. We were living in a lawful pasture and we were claimed to be non-citizens, and they wanted us to go there and prove we were citizens, I notified my connections living around me, George W. Posey, known as Ely Posey, Mollie Stockton and my young half brothers, Coker's wife whom I represented (Mary S. Coker) and some other young ones. All of us appeared before the court on the day mentioned in the summons. Court set and called the trial. Joseph Mingo, being my town king, represented the case before the court. He satisfied the court that we were citizens. The judge told us to go home and attend to our own business, that we were all right. We held our improvements and have till to-day. The pasture that I was in was leased to John Gibson, and he refused to pay for the part I held. Afterwards

the part I was on was cut out of the pasture and my place was surveyed out of the pasture. By the authority of the Nation the surveyor who was employed to survey the pasture was ordered to leave out the place of citizens in the large pastures and my place was left out when the pastures were surveyed. Afterwards I began to fence a mile square, north of my place, for my pasture, and made a trade with the man who had the pasture leased, by which he paid me for that mile square. Joseph Mingo has always claimed me as a member of his town and a citizen of the Nation, and has always appeared and defended me when my rights were questioned. I have voted in the Creek Nation ever since 1889 in the principal elections, that is in the elections of the chief. I have voted in my town as a town member all the time till last year. The last election we have had that was the election called to consider the treaty with the Dawes Commission. We all voted in that election. I have acted as a deputy light horse—as a militia man. I was called on by Judge N. B. Childers to assist the light-horse and did so serve. I have guarded prisoners and acted in that capacity until the court discharged me. In the Chepon Flannery case I was requested by the judge to summon ten men. I summoned W. T. Morgan and other men, some of my relations, Ben Posey and G. W. Posey. I have held the position of assistant to the District Attorney,

Upter Bird, since January, 1897, under authority from him as shown by attached authority filed herewith and marked exhibit "C." A copy is filed by the Special Master.

"Before I put in my place, I went to see Chief Perryman and showed him my papers and told him who I was. He told me that he recognized me as a citizen and that I was as much a citizen as he was, and that the law did not bar me from putting in the place; that I was alright and that I should pick me out a place and go to work; this was all before I made the proof of citizenship before Judge Childers. I was struck off the roll of the Creek Nation by the Committee of Eighteen in 1895. I was never summoned to appear and was never given an opportunity to appear and make my proof before that Commission. I afterwards made application to the Commission of Five and gave bond for costs and stayed there six weeks trying to get a trial. They would not give me a trial and adjourned without giving me a trial. I then went before the Dawes Commission and made the application, which is now here in this court on appeal."

Such is the testimony showing the Creek blood of John C. Barber, Benjamin A. Barber, James M. Barber and Martha S. Coker, for they are all full brothers and sisters, and John C. Barber and Robert T. Barber are full brothers to each of them, John C. Barber, born

March 20, 1853; James M. Barber, born January 17, 1852; Robert T. Barber, born December 26, 1848; Benjamin A. Barber and James M. Barber, born of the same mother and begotten by the same father between Robert T. and John C. Barber, and yet Robert and John are recognized as Indians by the Dawes Commission and Benjamin and James M. are refused recognition.

Mrs. S. M. Coker is a full sister to them all, and she too is refused recognition by the Dawes Commission.

It is difficult to see how Robert Barber and John C. Barber, born of Sarah A. and Silas H. Barber can be Creek Indians by blood and Benjamin A. and James M. Barber and Martha S. Coker born of the same parents can be white people and citizens of the United States, without any Indian blood. A fair consideration of this fact is enough to convince the court that great injustice has been done, not to the Nation, because there is no doubt or denial that Robert T. Barber and John C. Barber are Creek Indians by blood, and the wrong and injustice is done to their brothers and sister who are denied their birth and blood rights.

MARY LULU POSEY.

Her Creek blood is shown by the testimony of John C. Barber and Robert T. Barber, page 56 printed record, and by the testimony of Mrs. E. H. Allen, page 57, and by the testimony of M. A. Posey, page 58.

by all of whom it is shown that she is of one-fourth Creek blood.

GEORGE W. POSEY.

He is shown to be one-fourth Creek Indian by blood by the testimony of Mrs. E. H. Allen and M. A. Posey, page 53 of the printed record, by the testimony of John C. Barber and Robert T. Barber, page 54 Mary E. Vance, page 55.

WILLIAM POSEY

Is one-fourth Creek blood as shown by the testimony of M. A. Posey, page 53; John C. Barber and Robert T. Barber, page 54; Mary E. Vance, page 55.

MOLLIE F. STOCKTON.

That she is one-fourth Creek Indian by blood is shown by Mrs. E. H. Allen, page 58; M. A. Posey, John C. and Robert T. Barber, page 59; Silas H. Barber, page 60.

R. F. BARBER AND R. W. BARBER AND
H. J. BARBER AND L. E. BARBER

Are shown to be a one-fourth Creek Indians by blood by the testimony of Mrs. E. H. Allen, page 62; M. A. Posey, page 63; John C., Robert T. Barber, page 63; Silas H. Barber, page 64; Joseph Mingo, page 64.

MRS. JENNIE JOHNSON.

She is known to be a one-fourth Creek Indian by blood by the testimony of Mary E. Vance and Hugh R. Johnson, page 55; L. C. Perryman, Joseph Mingo, page 56 and by the testimony of J. M. Allen, E. H. Allen, Thomas Barber and John Barber, page 61.

NINA POSEY AND BENJAMIN POSEY

Are each shown by the special masters in chancery to be one-fourth Creek Indians by blood, the testimony upon this point of Creek blood and residence seems to be overwhelming in favor of these appellants, and we do not think that a court can be found that upon the testimony in this case would deny that they are Creek Indians by blood and reside in the Creek Nation. There is not a syllable of testimony nor an intimation upon the part of any witness in this whole record denying their Creek blood or residence in the Creek Nation.

Upon another proposition this application ought to be decided in favor of these appellants. The act of Congress of June 10, 1896, directing the Dawes Commission to hear and determine applications for citizenship in the various tribes has this proviso: "And provided further that the rolls of citizenship of the several tribes as now existing are hereby confirmed." Page 339, Acts of Congress, 1895-'96.

If therefore these appellants were then properly and legally upon the existing rolls of the Creek Nation, they were confirmed by this Act of Congress as citizens of the Creek Nation.

It is contended that the Committee of "Eighteen," under the Act of the Creek Council, approved May 17, 1895, struck the names of these appellants from the Rolls of Creek Citizens, and in the opinion of the Judge of the Trial Court printed in this Record at page 41, the case of Roff vs. Burney, 168 U. S., 223, is cited as an authority for the Legislative Council of the Creek Nation, by itself or by its Committee of "Eighteen" to de-citizenize these appellants; but the law as laid down in that case is an authority, we maintain, against the right of the Creek Council or its committee by legislation to deprive appellants of their citizenship. In that case, Plaintiff Roff and his wife, Matilda Bourland were citizens of the Chickasaw Nation, not by blood but under an act of the Legislative Council, and we think the clear intimation from the opinion of the court in that case is that no property right could be taken away by such legislation. Certainly the opinion in Roff vs. Burney in no way supports the position of the learned Judge who tried the case upon the proposition for which it is cited.

We maintain in reference to the Creek rolls that these appellants were, up to May, 1895, upon the regu-

lar rolls of Creek citizens, and that the effort of the committee of "Eighteen," under the Act of the Creek Council of May 17, 1895, was fruitless in that they had no legal power and that the Creek Council could confer on them no legal authority to effectually drop appellants from the Creek rolls, that they therefore, in legal contemplation, remained upon the roll confirmed by Act of Congress, June 10, 1896. Further we insist that these appellants, being Creek Indians by blood as shown, and residents of the Creek Nation had such a vested interest in the lands of the Creek Nation, under the Patent from the Government above referred to as that they could not be divested there of by any legislative enactment. and still further we contend that the act of the Creek council did not give or purport to give to the Committee of "Eighteen" the power to act finally, but that its action was to be submitted to the Council which would then require legislative action on the part of the Council to confirm their finding and which was never had, and which we insist would have been powerless to disinherit these Creeks by blood if attempted.

We therefore turn our attention, first to the testimony, to ascertain whether appellants were upon the Creek roll.

James M. Barber, at page 45 of the printed record, says: "After having given the names of his children. the above named children were upon the census roll of

the Creek Nation until the year 1895, at which time the names of myself and children were stricken from the roll."

Mrs. E. H. Allen, in her testimony says: "That the said above named J. M. Coker, B. A. Barber, and their sister, M. S. Coker, were proven citizens of the Creek Nation and were placed upon the census rolls of said Nation and are entitled to all the privileges and rights of said Nation of Indians, as all other members of said Nation."

John C. Barber and Robert T. Barber, after naming their brothers J. M. Barber, B. A. Barber, and M. S. Barber, and their sister, M. S. Barber, says: "That each of their brothers and sisters above described and named did prove their rights and were placed upon the census roll of the Creek Nation, and were entitled each to have enjoyed all rights and privileges thereunder as citizens until the year 1895, when the authorities of said Nation, by their appointed Committee, did place them upon the doubtful list of members of said Nation. Record page 50.

On page 57 of the record, after speaking of Ben and Lulu Posey and others as their cousins, John C. and Robert Barber, say: "Their cousins above named did make application to prove their rights and were placed on the Census Roll of the Creek Nation, etc."

Further on page 59 of the record, after speaking

of their cousin, Mollie F. Stockton, John and Robert Barber state : "That their cousin above named did prove her right and was placed on the Census Roll of the Creek Nation and was entitled to enjoy all the rights and privileges of a citizen until the year 1895, when the authorities of said Nation, under their Committee, placed her on the doubtful list."

On page 68 of the record Joseph Mingo, Town King of Broken Arrow Town, says : "Afterwards the Council passed an act repealing the act which required the District Judges to pass upon these citizenship cases, then an act was passed by the Council requiring each Town King to make a correct roll of his own town. At that time I was elected Town King of Broken Arrow Town, and I noticed this act authorizing each Town King to make a correct roll of his town. In making the roll I found that Jim Barber's mother was a full sister to Mrs. Allen. * * * * * If Mrs. Allen was a citizen, her sister was also a citizen, and that it was satisfactory to them all that I should pass upon these peoples rights in order to get a correct roll of the town, and therefore I enrolled them in my town. At the time I was enrolling them Mary Stockton came up and though her maiden name was a little different they proved that she was of the same family and so I enrolled her. I had the roll made up as correctly as I could with these names on it and it was submitted to

the Council and the roll approved, and it was considered an authentic roll of the Creek Nation."

On page 53 of the record, Mrs. E. H. Allen, speaking of G. W. and Willie Posey, says "they were proven citizens of the Creek Nation and were placed upon the Census Roll of said Nation," and on page 57 of the record, she says: "Of Ben and Lulu, Trudie and Ambrose Posey, that they were proven citizens of the Creek Nation and were placed upon the Census Roll of said Nation."

To the same effect is the testimony of John and Robert Barber, as to G. W. Posey and Willie Posey, page 53 of the record.

On page 55 of the record, Hugh R. Johnsons says that he is the husband of Jennie Johnson, daughter of Eli Posey and a resident of the Creek Nation, where he and his wife have lived for the past ten years; that his wife's name is upon the Census Roll of 1890 of Broken Arrow Town in said Creek Nation, and she drew annuity money from the United States, as a Creek Indian by blood.

On page 56 of the record is the following certificate of L. C. Perryman, then Principal Chief of the Creek Nation: "Executive Office, Tulsa, Indian Territory, December 5, 1892. This is to certify that Jennie Johnson and her children, Clarence, Fannie and T. D. Johnson are all on the rolls of the Broken Arrow

Town upon the certified rolls, and are entitled to per capita payment as Creeks, L. C. Perryman, Principal Chief."

On the same page of the record, Joseph Mingo, states: "That he is acquainted with Jennie Johnson and knows that she was on the rolls and received her pro rata part of the money from the Creek Nation in the year 1891.

In record page 66, George Tiger, says: "All the people in the Barber, Posey, Jennie Johnson and others were rejected at that time, I had known Barber a long time before that. The persons struck off by the Committee were all on the Creek Rolls and had been approved by the Council before that time."

At page 67 of the record, N. B. Childers, who was then District Judge of Coweta District, says: "In the year 1892 while I was Judge of Coweta District I got an order from L. C. Perryman, who was Principal Chief of the Creek Nation, to investigate the citizenship of the Barbers and Poseys who lived near Wagoner. There had been some report made to him about them and he wanted the matter investigated by me. Complaint had been made to him that the Barbers and Poseys were going into some contract pastures and making farms, and that they were not citizens. When I got notice from him I notified Jim Barber and the others through my officer to meet me at the court house on a

certain day, with their evidence. They met me on that day and I held the investigation. I notified Joe Mingo, who was the Chief of Broken Arrow Town, to which these parties claimed to belong to be there and he was present on the day. I took the testimony of the witnesses that they produced there, citizens. I questioned the witnesses closely myself, and the evidence went to show that they were citizens and had a right there. The evidence is on the record. I then had a talk with Mingo, and he informed me that they had the same evidence all the time, and that they were entitled to citizenship, and for that reason he had them on his town rolls. I then made a report to the Chief to the effect that they had a right there as citizens. That seemed to settle the question, and they remained there as constituents of Broken Arrow Town, and the Town Chief kept them on his rolls until they were taken off the rolls. I recognized them as citizens until they were taken off the roll. * * * * *

It was the custom for a great many years for the Town Chiefs to keep a roll of the citizens of his own town and when he came to the Council no question was made as to the names on his roll. * * *

Finally the Committee of "Eighteen" was appointed to investigate the rolls. When the Committee investigated the rolls they did not notify the parties whom they were investigating. They too took up the different names and if they

thought they should not be on the rolls their names were scratched off. I was before the Committee several times, the Barbers and Poseys were scratched off at that time."

On page 62 of the record, Mrs. E. H. Allen, says :
"That the said above named R. F., R. W., H. J. and L. E. Barber were proven citizens of the Creek Nation and were placed on the Census Roll of said Nation. On page 63 the same testimony is given by John C. and Robert T. Barber. On page 64 the testimony of Joseph Mingo is to the same effect. On page 71 of the record, Ellis Childers, who was one of the committee, says :
"The Broken Arrow Town was brought up first and finally they struck the Barbers and Poseys. I am well acquainted with the family, and knew their connection and I made an objection to Jim Barber, George Eli Posey, the Coker family and the Stocktons and a number of others. I tried to make an objection to half of them but do not know whether I got half of them or not. * * * * I was trying to get my revenge. The Committee took my word and scratched them off. Those were the legal rolls of the Creek Nation. * * * * These people were not notified and were given no chance to prove their rights. These parties have been considered citizens both before and after that time. They have exercised the rights of citizenship and have been tried in our

courts and forced to do public duties. I summoned Posey, Morgan and Barber as militia, when I was Captain of the militia in the Cook Gang trouble. The Supreme Court decided that the Alien Act was unconstitutional and that the Council could not pass an act depriving any person of Creek blood of their rights in the land."

This testimony shows that they were on the rolls, otherwise they could not have been scratched off, and that they were the legal rolls of the Creek Nation; and in passing, we call attention to the fact that Mr. Childers testifies that the Supreme Court of the Creek Nation had decided that the Alien Act was unconstitutional and that the Council could not pass an Act depriving any person of Creek blood of their interest in the land.

Lewis McGilbra, who was one of the Committee of "Eighteen," says: "The rolls before the committee were the regularly authenticated rolls of the towns. * * * Ellis Childers came in and objected to the Barbers, Poseys, Berryhills and a whole lot of others, and they were all struck off the rolls. We had no right to decide as to their rights of citizenships, but this was done to keep them from drawing their per capita money." Record page 72.

Moses Smith, another member of the committee of "Eighteen," in his testimony, says: "When the investigation began, one man would object to the names

on the rolls of another King, and that King would object to the names on the rolls of the first King, and finally it got to be a fight between them. The Town Kings had a right under the Act of Council to make a correct list of the members of their towns, and if it had not of been for certain prejudice that existed among the members of the Council that caused the creation of this Committee, there would not have been any names scratched off whatever. I learned, from being in the position I was in, that this Committee was organized to exercise—which they did—a great deal of prejudice work, which is sometimes practiced by the politicians of the Creek Nation. As near as I can remember, this took place during the May session of the Council, 1895. If this Committee had not been appointed there could not have been any scratching, because the Kings had the authority to make up the rolls of their towns. They were the legal rolls. These rolls made up by the Kings which were submitted to the Committee of "Eighteen" were the last rolls that have been made up under the autghority of the Creek Nation, as far as I know. I remember the names of James Barber, Mollie Stockton, George Eli Posey, George A. Posey, Morgan, Mary A. Wassom, Mrs. Coker, Ben Posey and a great many others."

Attention is respectfully again called to the full statement of James M. Barber, pages 74-76.

Warrior A. Rentie, a member of the Committee of "Eighteen," in his testimony at page 77, says: "There were a number of these Poseys and Barbers scratched off the rolls. There seemed to be some trouble between the Town Kings and the members of the towns, one man would have some name scratched off the rolls of some town, and then the member from that town as an act of retaliation, would have names scratched off the rolls of the town of the first man. The Committee used what were regarded as the authenticated rolls. These were the authenticated rolls up to that time. If this scratching had not taken place the rolls that were used would have been the rolls confirmed by the Act of Congress of June 10, 1896."

Mr. Rentie is a lawyer by profession and we submit that his testimony is entitled to the greatest consideration.

On page 78 of the printed record, Gabriel Jamison, another member of the Committee of "Eighteen," says: "Some of the Poseys and Barbers were struck off while I was before the Committee, and some of them were kept on the roll. The Committee was using the regular authentic rolls of the Creek Nation. These were the same rolls with the exception of the scratched names that were in existence at the time the Dawes Commission took charge in June, 1896."

We think it cannot fairly be doubted in the face

of all this testimony that these appellants were enrolled upon the regular authentic rolls of the Creek Nation, and enrolled because they were of the Creek blood. Very much of this testimony is given by highly respectable officers of the Creek Nation, interested in preserving the integrity of their rolls. They remained upon it until May, 1895.

We deny the right or power of the Creek Council or of any committee appointed by authority of the Council, directly or indirectly, to de-citizenize and disinherit any resident Creek Indian by blood.

The power has heretofore been recognized by the Government in the tribal authorities to determine who are members of the tribe, but that power has long since been taken away, and since the report of the Dawes Commission, dated November 18, 1895, showing that in making the rolls and in unmaking them and making citizens and unmaking them by the tribal authorities their conduct had been characterized as in "disregard of the plainest principles of law and marked by the grossest injustice, and that the roll had become a mere political football." Congress has undertaken through a committee appointed by the President to determine who are citizens of the various tribes without any regard to tribal authority. This power though questioned and disputed by the tribal authorities is clearly within the power of Congress, and the law of

June 10, 1896, authorizing the Dawes Commission to make a roll was clearly within the scope of its legislative power.

In the case of *United States vs. Kagama*, reported in the 180th United States, page 375, this court said: "While the Government of the United States has recognized in the Indian Tribes heretofore a state of semi-independence and pupilage it has the right and authority instead of controlling them by treaties to govern them by Acts of Congress, because they are within the geographical limits of the United States, and are necessarily subject to the laws which Congress may enact for their protection and for the protection of the people with whom they come in contact."

That clearly settled the question of power in Congress by the Act of June 10, 1896, to confirm the existing roll and to authorize the Dawes Commission to add to the rolls.

But even when the power was recognized as in the tribal authorities to determine who were members of the tribe, the power ended there and in no way involved the power to limit or qualify the rights of those found to be tribal members by blood. Membership by blood once settled, it was beyond the power of the Creek Council even in direct terms and by direct legislation to divest the right vested in the Creek blood by virtue of the patent to the Creek Tribe of Indians, of which

these appellants are fixed as part and parcel, whenever they establish their Creek blood and their residence in the Creek country. That one cannot be divested of a vested right in property by legislative action is a principle of law too well understood to be questioned.

In Tiedeman's Limitation of Police Power, section 116, pages 335 and 336 it is said: "But when the right to the public enjoyment of lands is purchased by the individual it becomes a vested right, of which he cannot be divested by any arbitrary rule of law.

* * * * * It is sufficient for us to be able to say that when one becomes the tenant of the state or acquires an absolute title to an estate in land whether that estate be in fee, for life, for years or otherwise, his interest is a vested right, which is protected by the constitutional limitations against any arbitrary changes by legislation."

Further under the head of involuntary alienation, section 120, he says: "As a general proposition the legislature cannot divest one of his vested rights against his will." Again Mr. Cooley in his work on Constitutional Limitations, says: "Forfeitures of rights and property cannot be adjudged by legislative act, and confiscations, without a judicial hearing, after due notice, would be void as not being due process of law." Cooley's Constitutional Lim., page 444, 6th Ed.

The prohibitions in the Constitution of the United

States, found in Articles 1 and 14, that no state shall pass any law impairing the obligation of contracts, nor shall any state deprive any person of life, liberty or property without due process of law, ought to be sufficient to restrain these Indian Councils. For what these sovereign states cannot do may certainly be denied to these Indian Nations. The Creek blood of these appellants had been established. They had been placed upon the authentic rolls of the Creek Nation and for years recognized as members of the tribe by blood. Many of them exercising official functions; receiving payments of National monies, and it was beyond the power of the Council, directly or indirectly, to legislate away their vested rights in the Creek lands and property. The Creek blood established, there is no legislative power on earth, equal to the task of confiscating their vested rights in this property. If the Council could not do so by direct legislation it could not authorize its Committee of "Eighteen" to do so. We think it will take something more than running a pen across the name of a Creek Indian by blood, something more than the erasure of his name from an authentic National Roll by an unauthorized Committee, inspired, as the testimony shows this one was, by motives of revenge, to change a Creek Indian into a white man, or to take from him his Creek blood and vested rights. If the Creek Council itself had the power by direct legislation,

to legislate away the rights which inhere in the Creek blood, it might de-citizenize all the Creeks except members of this Council and Chief, and thus vest that vast public domain in themselves.

But we insist that the Act of the Creek Council of May 15, 1895, nor the Act of May 17, 1895, directing the Committee did not contemplate any final action on the part of the Committee. We quote the following clause from the Act of May 17, 1895: "Be it further enacted, the Committee of "Eighteen" appointed by act of the extraordinary session of Council, approved May 15, 1895, to examine and correct the Census Rolls of 1895, are hereby instructed and directed to entertain and consider any and all challenges and questions urged in good faith by any respectable citizen against the claim of any person to citizenship in this Nation, and strike from the rolls and preserve a correct list of all the names so stricken out and report the same to the present session of the Council."

Certainly the terms of this act are sufficient, if they were not intended to *give the widest scope* to the prejudice and revenge of any person who might come before the Committee and be able to present himself as a respectable citizen. All he had to do was to be a respectable citizen and in good faith urge the dropping of the names from the roll, and the thing was done, and citizens of the quarter blood, half blood and full blood,

and Committee discharged.

Respectfully,

M. J. SMITH, Cairman.

MILDRED McINTOSH, Clerk.

Approved June 8, 1895.

This report of the Committee was followed by no act or resolution introduced either in the House of Kings or the House of Warriors or passed by either body or approved by the Chief.

The first section of Article 1 of the Constitution of the Creek Nation is as follows : "Article 1, Section 1, The Law making power of this Nation shall be lodged in the Council, which shall consist of two houses, the House of Kings and the House of Warriors."

Section 4 of the Article 2 of the Constitution reads as follows : "Whenever any bill or measure shall pass both houses it shall be submitted to the Principal Chief for his approval or rejection, if he shall approve it, it shall become a law, if he shall object to it, he shall within five days return it accompanied by his objections to the house in which it originated."

There was no legislative sanction or approval given to the report of this Committee by either the House of Kings or the House of Warriors as required by the first article of their constitution.

There was no act or resolution which purported to have passed either the House of Kings or the House of

Warriors, submitted to the Principal Chief for his approval or rejection, so we maintain there is not and never was any legislative vitality in this proceeding, even if the power had existed in the Council to give it the effect claimed, and so we say there is no valid action taken by any lawful authority of the Creek Nation to remove the names of these appellants from the authentic rolls of the Creek Nation as they existed in 1895, but the rolls continued in legal effect so to exist until the passage of the Act of Congress of June 10, 1896, and that act confirms the roll as it then legally existed with the names of these appellants upon it.

Again it is contended on the part of those representing the Creek Nation that the act of the Creek Council called the Alien Act, approved October 26, 1889, debars some of these appellants from their Creek rights. This Act is found on page 105 of McKellop's Digest of the Creek laws. The first section is as follows: "All persons who were born, or who may be hereafter born, beyond the limits of the Indian Territory, and may have heretofore been entitled to make application for citizenship, on account of Indian blood or tribal adoption, and who have continuously resided beyond, or outside of the jurisdictional limits of the Muskogee Nation, for the period of twenty-one years, are hereby declared aliens, and not entitled to citizenship in the Muskogee Nation, or to any of the privileges

thereof." The fourth section is as follows : "This Act shall not apply to persons who have heretofore filed application for citizenship and where cases are now pending." All these appellants, except James M. Barber, and his children, were residing in the Creek Nation at the time of the passage of this Act. He had formerly, in 1872, resided in the Creek Nation, and finally returned from Texas to make the Creek Nation his permanent home in 1890, within about one year after the passage of this Act. He is not embraced within its terms, for he had not resided outside of the Creek Nation for twenty-one years before the passage of this Act, if that would be claimed to bar him, for according to the testimony, he first came to the Creek Nation in 1872, remained there awhile and then returned to Texas, all the time claiming the Creek Nation as his home, returning to the Creek Nation in 1890. It is impossible to crowd twenty-one years between 1872 and 1890, therefore he does not fall within the conditions prescribed by the Alien Act, for disinheriting him. But we insist that as this Act proposes to confiscate by legislation the vested property interest of Creek Indians by blood, it is inoperative and unconstitutional, and Judge Adams correctly so decided it ; and we further contend that James M. Barber comes within the provision of the fourth section of this Act. His application for citizenship, having been filed and actually proved up long be-

fore the passage of this Alien Act.

On page 52 of the record, Mrs. Lucinda A. Smith, says : "Benjamin Posey was the father of the following named persons and that he proved up their rights as citizens of the Creek or Muskogee Nation, said proof was made before Judge Reed, District Judge, Sarah A. Barber, nee Posey ; * * * and she further states that the proof was also made for the children of the foregoing parties mentioned." The testimony shows that James M. Barber was one of the children of the above named Sarah A. Barber, nee Posey. At the time of making her affidavit Mrs. Smith was sixty-four years of age and the niece of Benjamin Posey. On page 51 of the record is found the affidavit of Benjamin Posey, made on the 15th day of September, 1882, when he was seventy-six years of age. He names among others of his children, Sarah A. Posey, who married Silas H. Barber, the father of James M. Barber. The testimony shows that afterward, Benjamin died and was buried in the Creek Nation. On page 54 of the record is found the testimony of Shelton Smith, who states : "He was acquainted with Benjamin Posey and Eliza Posey, his wife, and that they were recognized as Creek or Muskogee Indians by blood and descent ; that he was present at the time when Benjamin Posey proved up the rights of his children before Judge Reed, who was Judge of the Okmulgee

District in the Creek Nation according to law. The following named persons are the sons and daughters of Benjamin Posey, whose rights were proven up by the said Benjamin Posey before Judge Reed as above stated. The rights were acquired through blood and not adoption, Sarah A. Barber, nee Posey," and he names others of the said children. This testimony showing the application for James M. Barber, by his grandfather, and that his rights were proven up, is further corroborated by the following Committee report filed in the Council October 20, 1890, on page 45 of the record :

COMMITTEE ROOM, OKMULGEE, I. T., Oct. 20, '90.

HONORABLE NATIONAL COUNCIL :

GENTLEMEN : We, your Committee, to whom was referred the application of Benjamin A. Barber, Harrison E. Barber, Mariah E. Barber, Eva A. Barber, Bennie Barber, James M. Barber, Sarah E. Barber, Bertie E. Barber, John S. Barber, Pearl J. Barber, Niles Barber, M. S. Coker, Silas G. Coker, James M. Coker, Robert Coker, Eva Coker, Maud F. Coker, Hardy J. Barber for citizenship in the Muskogee Nation have carefully considered same and would recommend to your honorable body the adoption of the following Act, to-wit :

Very respectfully,

THOMAS KNIGHT, Chairman."

“Be it enacted by the National Council of the Muskogee Nation, that Benjamin A. Barber, Harrison E. Barber, Mariah E. Barber, Eva A. Barber, Bennie Barber, James M. Barber, Sarah E. Barber, Bertie E. Barber, John S. Barber, Pearl J. Barber, Niles Barber, Mary S. Coker, Silas G. Coker, James M. Coker, Robert Coker, Eva Coker, Maud F. Coker, Hardy J. Barber, be and are hereby declared citizens of the Creek or Muskogee Nation by reason of Indian blood.

Adopted :

WARD COACHMAN, President H. of K.
A. P. S., Clerk pro Tem.”

It is impossible therefore to conclude, after a consideration of all this testimony, that any of the appellants are included within the terms of the Alien Act; but if they were their rights could not thus be legislated away.

It is further contended, on the part of those representing the Creek Nation, that the District Courts of the Creek Nation had no power to hear and determine applications for citizenship. The learned Judge, who tried this case, concedes that the District Courts of the Creek Nation have the jurisdiction to hear applications for citizenship, but contends they have no jurisdiction to try or decide them. The first section of the Act conferring jurisdiction on the District Courts found on page 63 of Perryman's compilation of the Creek laws,

is as follows : "Section 1 : All persons having resided out of the limits of the Muskogee Nation and whose rights as citizens of the same may seem to be questionable in consequence of intermarriage with non-citizens, shall be bona fide citizens of this Nation, provided they can prove, to the satisfaction of the proper authorities, that they are of Muskogee descent, and not further removed than the fourth degree." Section 2 : Has no bearing upon the question, but the Third Section is as follows : "Section 3 : Any person claiming citizenship under these provisions, shall, in order to establish his or her rights, prove the same by a responsible, disinterested native witness before the District Court."

Section 1, Article 4 of the Constitution of the Creek Nation, is as follows : "Section 1 : The Muskogee Nation shall be divided into six districts, and each district shall be furnished with a Judge, a Prosecuting Attorney and a company of Light-Horsemen."

"Section 2 : The Judge shall be chosen by the National Council for the term of two years. He shall try all cases, civil and criminal, where the issue does not exceed \$100."

Mr. Blackstone, says : "A court is a place where Justice is judicially administered."

The First Section of the Creek Act above quoted, says : "They shall be bona fide citizens of this Nation, provided they can prove to the satisfaction of the proper

authorities that they are of Muskogee descent." The Third Section, names the proper authorities before whom this proof shall be made ; that is, they shall prove the same before the District Court ; and we fail to see why they should be sent to this Court or place where "Justice is judicially administered" with their proof, unless that proof is to be followed by the judgment of that Court. The learned Judge, who tried this case below, on page 32 of the record, says : "This section can only be construed as conferring on the Court the power to receive the proof of citizenship and report the same to any tribunal authorized to confer it. This seems to be the construction which was given to the Act by N. B. Childers, who in his testimony in this case, taken before the Special Master, Mr. Gibson, states that he received a notice from Chief Perryman to investigate the citizenship of the Barbers and the Poseys and that after making investigation he made a report to the Chief to the effect that they had a right there as citizens." The learned Judge overlooked the Judgment which was rendered in that case by Judge Childers, which appeared in the record he was then considering, found on printed record, page 82, in these words : "After questioning the witnesses in Barber and Posey case, I, N. B. Childers, Judge of Coweta District, rule and so decide, that the claimants heretofore mentioned, were citizens of the Muskogee Creek Nation and entitled to enrollment.

Witness my hand this the 13th day of June, 1893,
and the Seal of Coweta District.

N. B. CHILDERS,

Judge of Coweta District, M. N."

And so we say that the fifth, sixth, seventh and eighth assignments of error are sustained.

We respectfully insist that these appellants show themselves by undisputed testimony to be members of the Creek Tribe by blood, that they have been long recognized by the National authorities as members of the tribe, and as such invited and encouraged to make homes and valuable improvements upon the ~~land~~ ^{land} granted and conveyed for their benefit by the Government of the United States.

And we further respectfully insist that they were upon the authenticated rolls of the tribe and confirmed by the Act of Congress of June 10, 1896, and are now entitled to enrollment under the order and decree of this Honorable Court.

WM. M. CRAVENS,

For Appellants.